IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1247

In Re:
IMPERIAL DISTRIBUTORS, INC.,
and EAGLE PRODUCTIONS, LTD.,
and KENNETH GUARINO,
Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

STATUTORY PROVISIONS

RULES

CONSTITUTIONAL PROVISIONS

INDEX TO APPENDIX

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on January 4, 1979 denying Petitioners application for a Writ of Mandamus directed to the United States District Court for the District of Rhode Island.

OPINIONS BELOW

Petitioners filed a Motion under *Rule 41 (e)* of the *Federal Rules of Criminal Procedure* together with a Civil Rights Complaint founded upon *Title 42, U.S.C., Section 1983*, Docketed on March 29, 1978 in the District of Rhode Island as Civil No. 78-162. With respect to the claims presented under the *Rule 41 (e)* motion, as aggrieved parties, Petitioners sought to have the District Court hear and determine the validity of a search and seizure by federal officers of *First Amendment* materials as well as all of their necessary dissemination instruments, equipment, and records and order their return, all in a pre-indictment posture. With respect to the claims presented under the Civil Rights Complaint, the Petitioners, sought to have Declaratory Judgment and Injunctive Relief issue against federal and state officers jointly, but relating to separate searches and seizures complained of.

His Honor, Judge Raymond J. Pettine, of the District of Rhode Island, during and at the conclusion of the trial, variously dismissed the officers and claims with respect to liability under the Civil Rights Complaint. The Civil Rights Complaint dismissal was not appealed nor formed any part of the subsequent matter before the Court of Appeals below nor of this Petition and is brought to the attention of this Court merely for information regarding the surrounding facts.

His Honor, Judge Pettine, on December 5, 1978, filed his Memorandum and Order, which was supplemented by an "Errata" correcting certain wording of that Memorandum and Order filed on December 6, 1978, whereby he refused to make a finding of fact or enter any judgment in the matter, but instead entered an Order invoking Abstention. The *Rule*

41 (e) Motion Proceeding was not otherwise dismissed or ruled upon so as to become a final appealable Order. The Memorandum and Order and the Errata are not reported in any official published reports as yet and are set forth as Appendix "B" herein.

Petitioners then filed a Petition for Writ of Mandamus in the United States Court of Appeals for the First Circuit thereby seeking to require the District Court enter its adjudication of Petitioner's *First* and *Fourth Amendment* claims in the *Rule 41 (e)* proceeding below. The matter was docketed as No. 78-1559 on the Original Case Docket. On January 4, 1979, the United States Court of Appeals, without opinion, entered its Order denying the Writ. This Order is not reported in any official published reports and is set forth as Appendix "A" herein.

JURISDICTION

The unpublished Memorandum and Order of the United States District Court for the District of Rhode Island was entered on December 5, 1978 and the Errata entered on December 6, 1978. That Order was for abstention, whereby the merits were not reached nor was any final appealable Order otherwise entered, and the matter remains as an undecided action on the trial docket.

The unpublished Order of the United States Court of Appeals for the First Circuit entered on January 4, 1979 denied the Petitioner's requested Writ of Mandamus and the judgment was thus final. *United States v. Nixon*, 418 U.S. 683; *South Carolina v. Seymour*, 153 U.S. 353. The jurisdiction of this Court is invoked under *Title 28, U.S.C., Section 1254.*

QUESTIONS PRESENTED FOR REVIEW

1. May a federal trial Court under *Rule 41 (e)* proceedings abstain from deciding the merits of *First* and *Fourth Amendment* claims, thereby precluding relief to disseminators when expression materials and their necessary instruments, records and facilities have been seized and suppressed so as to permit the seized materials use in the continuation of a thus far unfruitful criminal investigation in a different federal district from the District of seizure and where the Motion for Return is presented?

2. Does a federal District Court, in the district of seizure, have a duty not only to hear but also to determine the merits of a Motion properly filed under *Rule 41 (e)* of the *Federal Rules of Criminal Procedure* when involving the seizure and suppression and "prior restraint" of presumptively protected *First Amendment* material requiring the Court of Appeals to force compliance in the circumstances presented?

3. Is a *Rule 41 (e)* motion, the procedural vehicle envisioned by this Court and available to disseminators so as to test and enforce the procedural and substantive rights against "prior restraint" of expression secured under the *First* and *Fourth Amendments* as stated by this Court in *Heller v. New York*, 413 U.S. 483 at 490-493; *Roaden v. Kentucky*, 413 U.S. 496 at 501-506; *Stanford v. Texas*, 379 U.S. 476; *Marcus v. Search Warrants*, 367 U.S. 717; *Lee Art Theaters v. Virginia*, 392 U.S. 636; and *A Quantity of Books v. Kansas*, 378 U.S. 205 when no criminal charges are in being?

4. Was it an abuse of discretion for the Court of Appeals below to deny the request for a Writ of Mandamus, in the

circumstances presented, in order to enforce the provisions of *Rule 41 (e)* and to prevent abridgment of Petitioners *First* and *Fourth Amendment rights*?

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The pertinent provisions of the *First* and *Fourth Amendments* as well as *Rule 41 (e)* of the *Federal Rules of Criminal Procedure* and *Title 28, U.S.C., § 1651*, are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

On the morning of February 28, 1978, federal agents applied to a United States Magistrate in Boston, Massachusetts for a federal search and seizure warrant directed against a truck traveling from Providence, Rhode Island to Boston, Massachusetts, for the seizure of evidence of violation of *Title 18, U.S.C., § 1465* (Interstate Transportation of obscene materials). United States Magistrate Laurence P. Cohen immediately issued a document entitled "Order" not identifying the sought publications, whereby he commanded the federal agents merely to;

> " . . . *search* that one truck bearing Rhode Island commercial license 91826 *in order to determine whether or not there exists therein* obscene materials *of the same tenor* as Turkish Delight, Sex Photo Fiction No. 1 and Sex Photo Fiction No. 2."
> (emphasis added)

The federal officers armed with the "Order" to search, stopped the vehicle and immediately seized it and it's contents of books, films and magazines intact and arrested the driver, prior to searching it, and took them to the federal building in Boston where a later search and seizure was conducted of the contents of the truck.

Shortly thereafter, the same day, federal officers applied to a United States Magistrate in Providence, Rhode Island for a federal search and seizure warrant directed against Imperial Distributors, Inc., a disseminator and distributor of publications and films, located at 205 Laurel Hill Avenue, Providence, Rhode Island for the seizure of the business records of that company as evidence of or used in violation of *18, U.S.C. § 1465,* and certain expression materials. United States Magistrate Jacob Hagopian, who did not have any of the magazines or films presented to him nor viewed by him, immediately issued a search and seizure warrant for the seizure of:

> " . . . namely all business records of Imperial Distributors, Inc., relating to the interstate production, manufacture, distribution, purchase and dissemination of obscene materials, dating from April 29, 1975, to the present, including, but not limited to:
> . . (here was a lengthy listing of business type records)
> . . . a quantity of obscene materials, including . . ."

The federal agents the same day, in the afternoon with this warrant, commenced execution at the premises of Petitioners which concluded approximately four (4) hours later. Seized were some forty (40) cardboard cartons containing records, newspapers, first class mail, magazines, films, check

books, payroll records, bank statements, orders for publications, invoices, file cabinets intact, accounts payable and receivable, and other documents not only of Imperial Distributors, Inc. that was named in the warrant, but also seized were all personal, business and financial records of Kenneth Guarino, Eagle Productions, Ltd., and numerous other corporations and business entities themselves disseminating films, magazines and books that maintained business records and offices on the premises known as 208 Laurel Hill Avenue.

A Motion requesting a copy of the affidavit supporting the "Order" of search, to see if other materials were in the truck which formed the foundation of the first search was filed on March 3, 1978 in the United States District Court in Boston, but was denied. When the matter of the preliminary hearing came on against the arrested truck driver on March 20, 1978, in Boston, the government again opposed giving up a copy of the affidavit supporting the initial search. The government then elected not to proceed in further prosecution of the arrested truck driver and all criminal charges were dismissed. No criminal charges were thereafter pending in any federal court. The "Order" of search was a search for probable cause to seiz which in effect was ex post facto to the seizure.

The motion requesting a copy of the supporting affidavit for warrant to search the truck was made in writing on March 3, 1978 and which was again renewed orally on March 20, 1978 was opposed by the government. United States Magistrate Cohen, in Massachusetts in writing refused to order a copy of the affidavit be produced and wrote a handwritten order of denial upon the motion as;

"3-3-78. After hearing and upon review of the affidavits in support of the search warrant and seizure warrant, defendants' motion is allowed except as to said affidavits. Said affidavits need not be disclosed until after the grand jury has reviewed and disposed of the matters pending before it relevant to this seizure. Provided that the United States diligently presents this matter to the grand jury.

Laurence P. Cohen,
U.S.M."

On March 29, 1978, more than a month after the seizure in Rhode Island, at a time when no federal criminal charges were pending, Petitioners then filed a Motion for Return of Property under *Rule 41 (e)* of the *Federal Fules of Criminal Procedure*, in conjunction with the Civil Rights Complaint set out above, which was docketed as Civil No. 78-162 in the District of Rhode Island. The basis of the Motion was that this was the District of seizure at the premises of the distributor and that; (1) property was illegally seized without warrant; (2) the warrant was insufficient upon its face; (3) the property seized was not that described in the warrant; (4) that it issued without probable cause; (5) the warrant was illegally executed; and (6) the material seized was constitutionally protected expression material and necessary dissemination instruments and documents under the *First Amendment* and their seizure and suppression constituted an invalid "prior restraint" upon dissemination of that and other speech and press materials by Petitioners.

Further, it was alleged that Magistrate Hagopian, in Providence, was neither presented with, nor did he examine any

of the press materials sought or made any independent neutral and detached judgment of the obscenity *vel non* of the materials, but instead proceeded to issue the warrant merely upon the conclusory allegations of the federal officers in their application.

Trial was promptly conducted on April 6 and 7, 1978 in the District of Rhode Island before the Honorable Judge, Raymond J. Pettine. Testimony at the trial by the executing officers revealed that no examination was made of any of the documents seized by them or any determination made by them that any record seized related in any way to any allegedly obscene item believed to be in violation of *Title 18, U.S.C., § 1465*. In fact the officers testified that they had not examined any of the items seized. Evidence introduced revealed that opened and unopened first class United States Mail, entire file cabinets with contents intact, newspaper articles and every document on the premises was seized leaving only blank scrap paper and cloth money bags. Those seized records and publications and films were put in and thereafter taken out of the premises in some 40 cardboard boxes. Included were all personal, tax, and financial records of Petitioner Guarino and his wife as well as all business, tax and financial records of several bookstores, theaters and other business entities none of whom were listed in the search and seizure warrant or even sought in the application and affidavit. No person was arrested or charged.

The officers testified that they returned to the premises on March 2, 1978 along with state officers as observers, but for the purpose of determining if they may have in some way overlooked any other records on the premises, but found none.

At that trial the United States Attorney candidly conceded to the Court, on the record, that the United States had not filed any crimin. charges arising out of the seizure in the Districts of Rhode Island or in Massachusetts and that no criminal charges would in any event be brought in the District of Rhode Island. Evidence was also presented that since the dismissal of the only existing federal criminal charge in Massachusetts, on March 20, 1978, there was no federal criminal proceeding in being concerning the Petitioners or the seizures, in which to bring a claim of unlawful seizure. The District Court was also presented with evidence of the refusal of the District Court of Massachusetts to even disclose the affidavits there so as to permit the Petitioners to present their claim in Massachusetts.

More importantly, however, was the fact that several of the Petitioners were not a party to the seizure in Massachusetts and probably could not present a claim of unlawful seizure in that District in any event since they were only claimants of the material seized in Rhode Island where their Motion was properly filed.

The government elected not to introduce any evidence in support of the seizure or in opposition to the claims presented by these Petitioners.

At the conclusion of the trial, Judge Pettine dismissed the remaining portions the Civil Rights Complaint involving other matters and retained the claims presented under the *Rule 41 (e)* Motion. No appeal of those dismissals was entered and that matter is not before this Court.

Judge Pettine also directed that the Defendants and the Petitioners file a Brief in support of their respective positions and claims on or before 60 days, or May 8, 1978, so that a ruling could be made immediately thereafter. The Petitioners filed the requested Brief with the Court on the date directed, but the government and federal officers filed none. Nearly a month later on May 30, 1978 the Petitioners moved under Local Court *Rule 12 (a) (2)* for entry of judgment. With that request were attached, as exhibits, numerous correspondence between the government and Petitioners and their counsel indicating that their requested extensions to file quarterly and annual tax returns both state and federal were denied and that possible civil or criminal charges as well as monetary penalties would be imposed. This would be done to Guarino and his wife as well as the bookstores and corporations who had all their records seized and which were unavailable to them.

On June 13, 1978, a chambers conference was held between the parties and Judge Pettine. Petitioners were directed to prepare an order in which to clarify the remaining issues and the present posture of the case. On June 26, 1978 the Court entered its Order setting forth the remaining issues which involved only the claims presented in the Motion under *Rule 41 (e)* here. The Order also directed that Briefs be filed on or before October 1, 1978. Petitioners again filed a timely Brief as directed, but the federal officers and government did not.

On October 27, 1978, Petitioners filed a Motion For Judgment Granting Requested Relief together with documentation of refusals to extend tax filing deadlines received by them although Petitioners notified the government they had no receipts, deposits, sales records, invoices, checkbooks

or stubs, cancelled checks or any other item to show monies received or paid out which in fact prevented them from paying their employees commissions or withholding. It was alleged that nearly $200,000.00 in goods and accounts receivable could not be collected nor any bills paid as well as no records existed in their possession of the numerous orders and delivery addresses necessary for delivery of publications and films. This was true of the Petitioners and as well the other business entities involved. Letters were also submitted showing claims and threats of suits for bills that could not be verified or paid for publications thereby endangering the right to obtain additional publications.

In addition, several tax lien documents were filed against Petitioners and copies submitted to the Court showing that the State of Rhode Island had placed these tax liens against the various corporations as well as the officers of them including Petitioner Guarino.

The government finally filed their Brief on November 20, 1978, some nine months after the seizure and some seven months after the Court's request and conclusion of the trial.

On December 5, 1978, the Honorable Judge Raymond J. Pettine, of the District Court of Rhode Island, entered his Memorandum and Order where it was noted;

> "Without any of its business records, Imperial Distributors, Inc. found it impracticable, if not impossible, to compute its taxes, verify its bills, and perform sundry other business tasks. Imperial Distributors made known its need for the business records and requested their return. The F.B.I. made copies of the records available at their local office in Providence and notified Imperial Distributors that the copies would be released upon payment of a copying fee. The copies have never been claimed."

The Court apparently overlooked the fact that in order to secure their previous ability and standing of dissemination and to meet governmental requirements, it would take copying of tens of thousands of pages of documents since entire multi-drawer file cabinets full of essential distribution records were taken in addition to some 40 cardboard cartons of records described by witnesses as some being at least 2 feet deep and others being 3 feet deep. At the minimum some 80 and possibly as much as 140 lineal feet of records beside the entire file cabinets of records were taken. Given the amount of individual pages contained in only 1 lineal foot of paper documents it is virtually impossible to calculate the total cost of reproduction, but the least cost per page by xerox method is several cents. In effect, if the documents could ever be sorted out to the point that the necessary ones were identified it would still have imposed a prohibitive cost factor on the parties to obtain these records so as to operate the business and file government documents as before the massive raid. Also overlooked was the fact that the first request to the government for copies of the records did not result in the immediate offer to provide copies. The United States Attorney initially asked counsel for Petitioners to write to the Internal Revenue Service and others to seek an extension of time. Such letters were sent on March 20, 1978 and a copy of which was filed with Petitioners Motion on May 30, 1978 in the Court records below. Those requests were rejected by letter dated April 5, 1978 copy of which also was filed with that pleading.

It was not until March 30, 1978 the day following initial arguments before the Court below that the government indicated that copies would then be made available but at a cost to Petitioners.

In the Court's opinion Judge Pettine, having before him the evidence and testimony aptly stated;

> "Determining the validity of the contested Rhode Island warrant necessarily requires the Court to determine the validity of the Massachusetts warrant. *If this Court engaged in such determination, an order requiring the return and suppression of all the seized evidence is a distinct possibility.*"
> (emphasis supplied)

The Court, however, in its decision at a time when no federal criminal charges were pending in any District (see Errata, appx. B hereto) and long after the conclusion of the trial and evidence and some 10 months after the seizure erred and simply elected to abstain from deciding the matter. The Court ordered Petitioners instead to go to a foreign District from seizure where only an investigation was being conducted and then only with respect to Imperial Distributors and seek to relitigate the matter without the right to obtain the founding affidavits.

On the basis of judicial economy and the avoidance of duplicative litigation the Petitioners erroneously were directed by the Court to file new pleadings and conduct a new trial, from the beginning in Massachusetts, in order to secure relief of *First* and *Fourth Amendment* rights. The entire case was stayed but not dismissed. The prompt initial hearing

and trial, granted by the Court, never resulted in a final appealable decision due to the order staying the matter.

On December 26, 1978, Petitioners filed a Petition For Writ of Mandamus in the United States Court of Appeals for the First Circuit, docketed as No. 78-1559 on the Original Docket, seeking an Order to require Judge Pettine not to abstain but to enter his findings and judgment in the case below in which he had abstained and entered a stay.

On January 4, 1978, the Court of Appeals entered its Order, without opinion, denying the Petition for Writ of Mandamus.

At the preparation for filing of this Petition to this Court, no federal criminal charges, even now, are in being and Petitioners have neither been given the founding Massachusetts affidavits or any of the seized goods or copies thereof. The materials remain seized and suppressed, causing substantial imposed and threatened penalties and virtual destruction of Petitioner's rights of dissemination. The possibility of future federal criminal charges against a Petitioner in a different federal district has foreclosed vindication of Petitioner's *First* and *Fourth Amendment* rights.

HOW FEDERAL QUESTIONS ARE PRESENTED

The affirmative claims, involving constitutional questions, were initially raised by Petitioners in the District of Rhode Island by verified pleadings in a *Rule 41 (e)* Motion proceeding (in conjunction with and initially involving a federal Civil Rights Complaint which is not a part of this proceeding.) The claims made were that a mass seizure and suppression of presumptively protected *First Amendment* speech and

press material had occurred, without a hearing on the propriety thereof. Further, that the materials, instruments and documents necessary for dissemination of those and other *First Amendment* materials and the viability of the dissemination business had been subjected to an invalid prior restraint creating a chilling effect upon Petitioners *First Amendment* rights. Also alleged was the basic criteria required under the provisions of *Rule 41 (e)* and more specifically that; (1) *First Amendment* and other materials were seized without a warrant contrary to the *Fourth Amendment*; (2) the warrant was a general warrant under the *Fourth Amendment* and insufficient upon its face particularly for the seizure of *First Amendment* materials; (3) the property seized was not that described in the warrant as required under the *Fourth Amendment*; (4) that there was not adequate probable cause for believing the existence of the grounds on which the warrant was issued and critically so for the higher degree of probable cause and the necessary neutral, independent and detached judicial determination of obscenity required under the strictures of the *Fourth Amendment* for the seizure and suppression of *First Amendment* materials; (5) the warrant was unreasonable in its execution by the mass seizure and suppression of *First Amendment* materials and lack of an adversary hearing on such prior restraint.

None of these claims were answered or otherwise determined since the District Court decided merely to abstain from making a decision upon any of them. Since no final appealable order had been entered, there apparently was no foundation for an appeal especially since the matter was simply stayed and has remained open on the docket. No vindication of Petitioner's substantial constitutional claims was available.

The Petitioners then filed their Petition for Writ of Mandamus in the Court of Appeals seeking relief from that abstention. The Petitioners presented the issues as; (1) whether *Rule 41 (e)* is a rule founded upon equitable principles which permitted a Court to deny relief to parties being restrained or otherwise prevented from dissimenation of *First Amendment* materials; (2) whether a motion under *Rule 41 (e)* is the proper method to vindicate *First Amendment* rights under the decisions of this Court prohibiting prior restraints and seizures against expression material without a hearing thereon; (3) whether the Court below must render a decision upon these claims to assure *First Amendment* protection; and (4) whether a citizen must file for return of the seized expression materials in the District of investigation and not the one of seizure and residence of the desseminators.

The Court of Appeals merely decided that no Writ of Mandamus would issue.

REASONS FOR GRANTING THE WRIT

The District Court had the undecided claims of Petitioners before it and pending for a period of some ten months. During that time prompt opening oral arguments were presented and several days of trial were conducted and concluded. Petitioners presented numerous witnesses and substantial documentary evidence, affidavits, and further offers of proof as requested by the Court for early completion. The government, however, had presented no evidence in support of their seizure and suppression of the materials, but merely has relied in their Brief upon two basic defenses. First, that the search warrant was clothed in a presumption of validity. Secondly, that when a federal criminal investigation is being conducted

in a foreign district from the District and situs of the seizure that all seizure claims must be presented in the situs of the investigation, during trial, when and if it arose. Overshadowing all of this was the government position that the seizure of *First Amendment* material and the instruments and documents necessary to the continued dissemination of that and other expression material were subject to seizure and government retention, without limit, pending the completion of a continuing criminal investigation. The government elected not to introduce any other justification for such suppression and prior restraint of the *First Amendment* materials.

This Court has repeatedly directed not only the lower state courts, but also the lower federal courts to be sensitive to fragile *First Amendment* rights and to prevent their undue suppression without an independent and neutral judicial determination in a manner so as to focus searchingly on the issue that the material is not protected and in the event of a massive seizure or total suppression that a "prompt" adversary hearing be provided before or contemporaneous with such massive or total suppression. These elementary procedures were denied to Petitioners in all the proceedings below. This Court should require the lower courts to comply with *Rule 41 (e)* and this Court's mandates and require the writ and judgment entered.

I.

THIS COURT HAS MANDATED THAT COURTS MUST SCRUTINIZE ALL MASSIVE SEIZURES, PRIOR RESTRAINTS AND SUPPRESSION *OF FIRST AMENDMENT MATERIALS AND RIGHTS.*

It has long been settled by this Court that obscene material is unprotected by the *First Amendment, Roth v. U.S.*, 354 U.S. 476, reaffirmed *Miller v. California*, 413 U.S. 15. Yet this Court has acknowledged the dangers of government undertaking to regulate any form of expression. *Miller v. California*, at 23.

This Court, as long as 65 years ago, also delineated that the duties and the power and authority of the federal Courts in proceedings that involved constitutional claims was obligatory. *Weeks v. U.S.*, 232 U.S. 383 at 391-392. That portion of this Court's opinion in *Weeks* was thereafter reaffirmed some 45 years later in *Mapp v. Ohio*, 367 U.S. 643 where this Court stated at pp. 647;

> " . . . 'the *Fourth Amendment . . . put the courts of the United States* and Federal officials, *in the exercise of their power and authority*, under limitations and restraints [and] . . . forever secure [d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and *the duty of giving to it force and effect is obligatory* upon all entrusted under our Federal system with the enforcement of the laws' . . ." (emphasis supplied)

In a somewhat different context, this Court noted that even the Judges of states are similarly duty bound, where it was stated in *Hoffman v. Pursue, Ltd.* 420 U.S. 592 at pp. 611;

> "Yet, Art. VI of the United States Constitution declares that 'the judges in every State shall be bound' by the Federal Constitution, laws and treaties.

> Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do."

This Court has also set forth some specific procedural guidelines for Courts and government officials to follow, seeking to balance the rights of the community with the protections afforded citizens under the provisions of the *First* and *Fourth Amendment*.

First, the principle has evolved from decisions of this Court that speech and press material, presumptively protected under the *First Amendment* have the "vital necessity", as stated in *Alberts v. California*, 354 U.S. 476, for the application of safeguards, to prevent denial of the protection of freedom of speech and press to material which does not treat sex in a manner appealing to prurient interests, 354 U.S. at 488. Therefore, a government is not free to adopt whatever procedures it pleases in dealing with obscenity, *Marcus v. Search Warrants*, 367 U.S. 717, at 730-731. Regulation of obscenity must conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. *Bantam Books v. Sullivan*, 372 U.S. 58 at 66.

Secondly, the determination of what constitutes protected versus non protected expression requires "that regulations of obscenity scrupulously enbody the most rigorous procedural safeguards, *Smith v. California*, 361 U.S. 147; *Bantam Books v. Sullivan*, supra at 66. This Court in *Bantam Books* described the previous holding in *Smith* and *Marcus* as;

> " . . . [it] is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks (citations omitted) . . .' The line between speech guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools' (citation omitted)".

The third important principle involved here is this Court's requirement of prompt adversary proceedings being afforded to disseminators together with a prior judicial determination by a neutral and detached magistrate with an opportunity to focus searchingly in order to impose a final restraint and to protect against gross abuses and large scale seizures of books, films and other materials prior to its imposition. This is required since "any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. U.S.*, 403 U.S. 713, 714.

Adversary proceedings have been required in *Marcus v. Search Warrants*, supra where the seizure was massive and for purposes of destruction which would have impaired dissemination of material possibly protected under the *First Amendment*. Again in *Marcus v. Search Warrants*, supra, such hearings were required for seizure of all copies of the materials, again for purposes of destruction. That Court so held even though the material may have been legally obscene.

This Court in *Blount v. Rizzi*, 400 U.S. 410, extended the hearing requirement into administratively imposed mail blocks stating that a judicial finding merely of "probable cause" alone was not sufficient 400 U.S. at 415-416. The

Court also cited *Freedman v. Maryland*, 380 U.S. 51, a censor board case, in apparent approval, by repeating that "prompt judicial review" be afforded within a specified brief period so as "to prevent the decision of the censor from achieving an effect of finality . . .". In the matter at bar there is no censor as in *Freedman* or *Blount*, but the principle for courts to follow must remain the same where executive branch officers commit essentially the same prior restraint, achieving an effect of finality as here.

This Court, in *Heller v. New York*, 413 U.S. 483, although finding there that the film "was not subjected to any form of 'final restraint', in the sense of being enjoined from exhibition or threatened with destruction . . . nor did temporary restraint in itself 'become a form of censorship' . . .", upheld the principles of *Quantity of Books v. Kansas*, 378 U.S. 205 and *Marcus*, supra stating:

> "Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of [them] are fully met.
>
> . . .
>
> "The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guaranties, . . .

The last principle here involved is, that, when expression materials are sought to be seized they may not be confiscated without a valid search and seizure warrant even though evidence of a crime committed in the presence of a police officer, *Roaden v. Kentucky*, 413 U.S. 496; and such may not be seized with a warrant which issued only upon conclusory allegations of a police officer, *Lee Art Theaters v. Virginia*, 392 U.S. 636. The warrant itself must particularly describe the expression materials to be seized, *Stanford v. Texas*, 379 U.S. 476.

The trial Court below did not entirely exclude all these principles. However, even though the hearing was promptly and fully extended and concluded, the Court erroneously refused to take the steps necessary to assure the protection required of the unadjudicated *First Amendment* materials and those documents essential to dissemination. There was no decision or judgment rendered at its conclusion.

Granting the required prompt hearing without substantively deciding the constitutional issues was an empty hearing indeed and tantamount to none at all. As to decisional promptness, the Court below has let this seizure and suppression extend for a year and also even 10 months beyond trial with no entering of judgment at all.

Surely this Court did not foresee that a federal Court would not follow both the letter and the spirit of its holdings by partial compliance with this Court's mandates to the virtual destruction of Petitioners rights, who now ask this Court to intercede on their behalf and direct the Writ of Mandamus to issue. This is especially true where materials were indiscriminately seized in a mass seizure involving materials not named in the warrant nor viewed by the issuing Magistrate

nor involved in any active indictment proceeding and which are only being used for investigative purposes.

II.

RULE 41 (e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IS THE PROPER PROCEDURAL VEHICLE, AND REQUIRES A DECISION BE RENDERED IN THE CIRCUMSTANCES HERE PRESENTED INVOLVING SEIZURE OF FIRST AMENDMENT MATERIALS.

Since this Court has mandated lower Courts to scrutinize large scale seizures and suppressions of expression material, utilizing adequate procedural safeguards, it seems apparent that seizures by federal officers of those materials must be scrutinized by federal Courts. The seizures below were apparently for criminal investigative purposes so therefore federal criminal statutes and rules shall apply. Petitioners, in reviewing federal provisions, can find the applicability only of one Rule of Court in this pre-indictment posture, i.e. *Rule 41 (e)* of the *Federal Rules of Criminal Procedure*. This rule provides for filing the pre-indictment motion in the District of seizure unless the matter comes on for hearing after indictment, in which event it shall be treated as a Motion to Suppress under *Rule 12*.

Therefore, Petitioners were in the proper District to bring such a claim. It seems ludicrous and wasteful to courts to complete an entire trial, file extensive pleadings and briefs, wait ten months after trial, and a year after seizure, without criminal charges, the Court issue an opinion and Order, and still not decide the matter in that opinion, leaving such a task to some possible future new proceeding in a different District

from seizure and from where the aggrieved parties reside, which may or may not come to fruition. The District Court did not follow the letter nor the spirit of *Rule 41 (e)* nor this Court's decisions respecting *First Amendment* freedoms. Judicial economy is not being served in this instance nor is there interference with another court since there is nothing before another court.

The most critical decision for this Court, however, is, if a judicial decision upon the validity of a seizure and suppression of *First Amendment* materials is mandated to be promptly conducted or previously conducted depending upon the circumstances, then how is it to come about? Is *Rule 41 (e)* then the procedural vehicle envisioned by this Court to be utilized by complaining disseminators? Petitioners believe so and ask this Court to so hold, so that there may be no future indecision by lower federal courts.

At least one other lower federal Court has been presented with this issue. That Court, in *Echols v. United States*, 577 F2d 308 (CA-5) held that aggrieved parties to seized and suppressed expression material cannot merely sit back and fail to complain until trial as to the lengthy suppression without hearing. It is the duty of the disseminator to affirmatively file a *Rule 41 (e)* motion for a speedy determination of the *First* and *Fourth Amendment* issues. A Petition for Writ of Certiorari was taken to this Court, Echols v. United States, October Term, 1978, No. 78-757 filed 10-23-78.

The case presented here is just the reverse. Petitioners filed this *Rule 41 (e)* motion as held by the Fifth Circuit, however the District Court of Rhode Island still abstained which was supported by the First Circuit when they denied Mandamus. Therefore the Circuits appear to be in disagreement and this Court should settle the issue.

III.

THE COURT OF APPEALS ABUSED ITS DISCRETION IN REFUSING TO ISSUE ITS WRIT OF MANDAMUS.

The Court of Appeals has the power of supervision over the lower federal courts within its District. Exercising this power, the Court may issue a Writ of Mandamus to compel the District Court to take appropriate action when it is it's duty to do so, or where necessary or appropriate to the jurisdiction of that Appellate Court. Ordinarily its issuance is an exercise of discretion, *Kerr v. United States District Court for Northern District*, 426 U.S. 394. And Courts of Appeal power, to issue such writs, is to be utilized only in exceptional or extraordinary circumstances, *Bancohio Corp. v. Fox*, 516 F2d 29.

However, when the duty of an officer to do an act is clear-cut, well-defined and positive then it is considered ministerial and compellable by mandamus. *Morgan v. Hines*, 149 F2d 21, cert. den. 326 U.S. 734.

Mandamus can be granted where there is no other available remedy or where available remedies are wholly inadequate, *Iowa City-Montezuma Railroad Shippers Assoc. v. U.S.*, 338 F. Supp. 1383; *Ex Parte Riddle*, 255 U.S. 450; *Whittle v. Roche*, 88 F2d 366.

Petitioners here believe the Court of Appeals below to be under the same duty as the lower trial Court here, to see to it that the massive seizure and prior restraint claim was reviewed and decided. Therefore it was an abuse of discretion to deny the requested Writ of Mandamus where the claim

involved *First Amendment* materials and freedom of expression. This is particularly true where, as here, it was a mass seizure and the parties themselves are not all involved in the criminal investigation and in all probability would be unable to enter a criminal case even if and when criminal indictment may issue.

CONCLUSION

This Court is presented here with the mechanics of enforcing the requirement that courts shall scrutinize all large scale seizures of books, films and other materials presumptively protected under the *First Amendment*. The trial court made the required prompt scrutiny but then decided to abstain and not render its decision. The Court of Appeals, under the same duty, elected to let the claims lie in limbo so that scrutiny and scrutiny alone is all that was granted Petitioners.

In this case the federal officers were permitted seizures and suppressions solely for investigative purposes. In the first instance to see whether similar materials were present or not contrary to the requirement that probable cause exist that the materials sought are at the place to be searched. The second search merely followed the investigative theme further.

The holding of the trial court, if left to stand, will effectively overrule some 65 years of holdings of this court, reduce *First* and *Fourth Amendment* claims to secondary considerations, and leave unenforceable *Rule 41 (e)* in any Court citing this decision for authority.

Petitioners pray therefore that this Court sweep away the matters of form here, and upon reviewing the substance, require the Writ of Mandamus issue requiring that the District Court abide by this Court's mandates and the provisions of *Rule 41 (e)* and decide these substantial constitutional issues.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

IN RE
IMPERIAL DISTRIBUTORS, INC., ET AL.,
Petitioners.

[U.S.D.C., R.I., Civil No. 78-162]

ORDER OF COURT
Entered January 4, 1979

Upon consideration of petition for writ of mandamus and attached papers,

It is ordered that said petition for writ of mandamus is hereby denied.

By the Court:

/s/_____
Dana H. Gallup
Clerk.

[Cert. cc: Clerk, U.S.D.C., R.I. and Hon. Raymond J. Pettine; cc: Messrs. Sheehan, Seekford and Sammartino.]

APPENDIX B

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND

IMPERIAL DISTRIBUTORS, INC., et al.

v.

UNITED STATES OF AMERICA, et al.

Civil Action No. 78-162

MEMORANDUM AND ORDER

On February 28, 1978 a special agent for the Federal Bureau of Investigation (F.B.I.) obtained a search warrant from a United States Magistrate for the District of Massachusetts on the basis of an affidavit describing three allegedly obscene magazines purchased in Boston, Massachusetts. Armed with this warrant, an agent from the F.B.I. searched the truck specified in the warrant, seized its contents, and arrested its driver. Investigation revealed that the truck shipment of the allegedly obscene material originated at Imperial Distributors, Inc., a book distributor located in Providence, Rhode Island.

On the basis of affidavits describing both the materials seized from the truck in Boston and other events observed by investigators, the F.B.I. applied for and received a search warrant from a United States Magistrate for the District of Rhode Island. The warrant authorized the seizure of all the business records of Imperial Distributors, Inc. that related to the interstate production and distribution of obscene materials. In the subsequent search and seizure, the plaintiffs allege that the

federal officials took vast quantities of material including all the business records and papers of Imperial Distributors, Inc. and related companies. The seized materials were transported to the F.B.I. office in Boston where they remain at this time.

As a result of the various seizures, Imperial Distributors, Inc. has been indicted in the District of Massachusetts for the interstate Transportation of obscene materials. No indictment has been returned in Rhode Island based on these searches and none is contemplated.

Without any of its business records, Inperial Distributors, Inc. found it impracticable, if not impossible, to compute its taxes, verify and pay its bills, and perform sundry other business tasks. Imperial Distributors made known its need for the business records and requested their return. The F.B.I. made copies of the records available at their local office in Providence and notified Imperial Distributors that the copies would be released upon payment of a copying fee. The copies have never been claimed.

Plaintiffs now request this Court to declare the warrants invalid and order the return and suppression of the original business records and other evidence that was seized. They allege that the records were illegally seized and that their immediate return is necessary if the business is to function normally. Even though Massachusetts is the site of the Imperial Distributor indictment and the location of one of the allegedly illegal searches, plaintiffs request this Court to grant injunctive relief. As authority, the plaintiffs cite Rule 41(e) of the Federal Rules of Criminal Procedure which does provide that an aggrieved person may move the district court for the district in which the property was seized for the return of the property.

This Court would be abusing its discretion if it mechanically invoked its equity jurisdiction pursuant to Rule 41(e). The present case presents important questions of duplicative, simultaneous and conflicting jurisdiction between two district courts. This case forces the Court to carefully consider whether to exercise its equity jurisdiction when it would result in the same two parties concurrently invoking the jurisdiction of two federal district courts and litigating identical factual and legal questions.

The sole issue in this action is also pending between the two same parties in the District of Massachusetts. The validity of the search warrants and seizures necessarily will have to be contested in the Massachusetts criminal proceeding. The United States Supreme Court has offered sound advice to lower federal courts faced with contemporaneous litigation in other districts:

> Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.

Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952). *Cf. Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976) ("the general principal is to avoid duplicative litigation.")

When faced with the prospect of simultaneous and necessarily duplicative litigation among federal districts, a district court normally has discretion to enjoin other proceedings or stay in its own proceeding. The First Circuit has been particularly forceful in preventing a multiplicity of actions on the same cause and has stated that "it is no longer open to question that a federal district court in the exercise of that [equity] jurisdiction may enjoin the party before it from attempting simultaneously to litigate the same matter in another court of coordinate jurisdiction in the same judicial system." *Small v. Wageman*, 291 F.2d 734, 735 (1st Cir. 1961).

The federal court in the District of Massachusetts will necessarily have to hear the criminal charges against the plaintiffs in this case. A normal procedure in such litigation is to inspect the validity of the search warrants and subsequent seizures that led to the indictment. The district court in Massachusetts will be hearing the entire case with all the available evidence and testimony; that court, therefore, is in the best position to dispose of the contested issue authoritatively, comprehensively, and efficiently. A dicision by this Court as to the validity of the warrants will merely produce a multiplicity of actions and the type of duplicative and piecemeal litigation that both the Supreme Court and the First Circuit have counseled against.

The plaintiffs offer no sound reasons for this Court not to stay the present action and avoid multiplicity of suits. The plaintiffs cannot realistically claim a severe and immediate need for its business records when it continues to fail to pick up the copies of the records offered by the F.B.I. In the absence of exigent circumstances that demand immediate relief, this Court refuses to add necessarily duplicative litigation to an already congested court calendar.

Another compelling reason also counsels this Court to stay the present action. Determining the validity of the contested Rhode Island warrant necessarily requires the Court to determine the validity of the Massachusetts warrant. If this Court engaged in such determinations, an order requiring the return and suppression of all the seized evidence is a distinct possibility. By making such determinations, this Court would unnecessarily interject itself into the criminal proceedings of another forum. Of course, such interference is inappropriate. For reasons such as this, "there is a strong federal policy of discouraging motions to suppress in the district in which the property was seized when such motions can be made in the *trial* court. *See* Advisory Comm. Note (Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States) 56 F.R.D. 143, 170 (1972)." *United States v. 1617 Fourth Avenue*, 406 F.Supp. 527, 528 (D. Minn. 1976) (emphasis in original).

Therefore, in order to avoid conflicts of jurisdiction between federal district courts and prevent simultaneous and duplicative litigation, the plaintiffs' motion is denied and the present action is stayed pending the decision of the Massachusetts district court.

So Ordered.

By Order,

/s/_____
Celeste Anne Harrison
Deputy Clerk

Enter:

/s/_____
Raymond J. Pettine
Chief Judge
December 5, 1978

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

IMPERIAL DISTRIBUTORS, INC., et al.

v.

UNITED STATES OF AMERICA, et al.

Civil Action No. 78-162

ERRATA

In the Memorandum and Order of the above-captioned case dated December 5, 1978, the following corrections are made:

Page 2, first paragraph should be replaced with the following:

"As a result of the various seizures, federal authorities in Boston have the materials before them for study and are seriously and actively seeking an indictment against Imperial Distributors, Inc. in the District of Massachusetts. Federal authorities, including the defendant in this case, assure this Court that no indictment based on these searches is contemplated in the District of Rhode Island."

Page 2, line 22 should be changed to read:

"Even though Massachusetts is the site of a possible . . . ."

Page 3, lines 8 and 9 should be changed to read:

"If federal authorities obtain their contemplated indictment, the sole issue in this action will also be pending between the two same parties in the District of Massachusetts."

Page 4, lines 7, 8 and 9 should be changed to read:

"If federal authorities are successful in obtaining the contemplated indictment, the federal court in the District of Massachusetts will necessarily have to hear the criminal charges against the plaintiffs in this case."

Page 5, last paragraph should be replaced with the following:

"Therefore, in order to avoid the likely conflicts of jurisdiction between federal district courts and prevent simultaneous and duplicative litigation, the plaintiffs' motion is denied and the present action is stayed pending the return of an indictment and/or the decision of the Massachusetts district court as to the validity of the contested warrants.

So Ordered."

/s/_____
Raymond J. Pettine
Chief Judge

December 6, 1978

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION.

[AMENDMENT I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[AMENDMENT IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TITLE 28, § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and seizure.—(a) Authority to issue warrant.—A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property which may be seized with a warrant.—A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) Issuance and contents.

(1) Warrant upon affidavit.—A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assest in enforcing any law thereof or to a person so authorized by the President of the United States.

It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon oral testimony.—When the circumstances make it reasonable to do so in the absence of a written affidavit, a search warrant may be issued upon sworn oral testimony of a person who is not in the physical presence of a federal magistrate provided the federal magistrate is satisfied that probable cause exists for the issuance of the warrant. The sworn oral testimony may be communicated to the magistrate by telephone or other appropriate means and shall be recorded and transcribed. After transcription the statement must be certified by the magistrate and filed with the court. This statement shall be deemed to be an affidavit for purposes of this rule.

(A) Method of issuance.—The grounds for issuance and the contents of the warrant shall be those required by subdivision (c)(1) of this rule. Prior to approval of the warrant, the magistrate shall require the federal law enforcement officer or the attorney for the government who is requesting the warrant to read to him verbatim, the contents of the warrant. The magistrate may direct that specific modifications be made in the warrant. Upon approval, the magistrate shall direct the federal law enforcement officer or the attorney for the government who is requesting the warrant to sign the magistrate's name on the warrant. This warrant shall be called a duplicate original warrant and shall be deemed a warrant for purposes of this rule. In such cases, the magistrate shall cause to be made an original warrant. The magistrate shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant.

(B) Return.–Return of the duplicate original warrant and the original warrant shall be in conformity with subdivision (d) of this rule. Upon return, the magistrate shall require the person who gave the sworn oral testimony establishing the grounds for issuance of the warrant, to sign a copy of it.

(d) **Execution and return with inventory.**–The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for return of property.**–A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) **Motion to suppress.**–A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) **Return of papers to clerk.**–The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) **Scope and definition.**–This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

No. 78-1247

In the Supreme Court of the United States

OCTOBER TERM, 1978

IMPERIAL DISTRIBUTORS, INC., ET AL., PETITIONERS

v.

HONORABLE RAYMOND J. PETTINE, JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF RHODE ISLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A-1) is not reported. The opinion of the district court (Pet. App. A-2 to A-8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1979. The petition for a writ of certiorari was filed on February 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly declined to issue a writ of mandamus to require the district court to adjudicate petitioners' motion for return of property.

STATEMENT

Petitioners are two Rhode Island corporations and one individual allegedly involved in the business of distributing and transporting obscene material in interstate commerce in violation of 18 U.S.C. 1465. On February 28, 1978, FBI agents in Massachusetts, acting pursuant to a search warrant, intercepted petitioners' truck containing allegedly obscene films, books, and magazines.[1] The agents seized these items and arrested the driver.[2] Thereafter other FBI agents obtained a search warrant covering various business records and obscene materials thought to be located at petitioners' establishment in Rhode Island. In addition to the information supporting the first search warrant, see note 1 *supra*, the affidavit supporting the Rhode Island search warrant detailed with particularity the obscene magazines and films seized in Massachusetts.

Subsequently, petitioners moved in the United States District Court for the District of Rhode Island to compel the government to return the materials seized in Rhode Island, which in the interim had been transferred to FBI headquarters in Boston for use in a grand jury proceeding then contemplated in the District of Massachusetts. Petitioners' motion, based on Rule 41(e) of the Federal Rules of Criminal Procedure, asserted that some of the property seized was not described in the warrant, that the warrant was not supported by probable cause, and that

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[1]The affidavit supporting this seizure described in detail the results of an extensive investigation into petitioners' distribution of obscene materials in Massachusetts. In particular, the affidavit recited the agents' personal knowledge that a truck bearing Rhode Island commercial license number 91826, which was regularly used by petitioners to distribute allegedly obscene materials, had been loaded at petitioners' premises on the morning of February 28. A copy of this affidavit, together with the affidavit supporting the Massachusetts search warrant, has been lodged with the Clerk of this Court.

[2]The government later dismissed the prosecution against the driver.

the seizure violated the First Amendment. Following an evidentiary hearing, the district court decided to abstain from adjudicating petitioners' contentions in order to "avoid the likely conflicts of jurisdiction between federal district courts and prevent simultaneous and duplicative litigation" (Pet. App. A-8). The court, however, retained jurisdiction of the case "pending the return of an indictment and/or the decision of the Massachusetts district court as to the validity of the contested warrants" (*ibid.*). The court of appeals summarily denied petitioners' request for a writ of mandamus directing the district court to rule on the motion for return of property (*id.* at A-1).

ARGUMENT

Petitioners contend (Pet. 17-27) that the court of appeals abused its discretion in declining to issue a writ of mandamus in this case. But "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations," and is "in large part a matter of discretion with the court to which the petition is addressed." *Kerr* v. *United States District Court*, 426 U.S. 394, 402, 403 (1976). In addition, petitioners, as the moving parties, have the heavy burden of showing that their entitlement to a writ of mandamus is clear and indisputable. See, *e.g.*, *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 662 (1978). Because, in the peculiar circumstances of this case, petitioners failed to carry their burden of persuasion, the court of appeals correctly declined to issue the writ, and further review by this Court is unwarranted.

As required by Fed. R. Crim. P. 41(e), petitioners moved in the district court in Rhode Island for a return of their property (mostly business records) seized in Rhode Island. The district court recognized, however, that a grand jury investigation into petitioners' activities was pending in another district and might soon lead to the

institution of criminal charges,[3] that this proceeding would necessarily determine all of the issues raised by petitioners in their Rule 41(e) motion, and that, indeed, the property whose return petitioners were seeking had previously been transferred to that district. Thus, rather than risk duplicative and potentially conflicting judicial decisions, the district court reasonably chose to stay the proceedings pending resolution of the same issues by another coordinate court within the same circuit. See *Meier* v. *Keller*, 521 F. 2d 548, 554-555 (9th Cir. 1975); *Oliver* v. *United States*, 239 F. 2d 818, 823-824 (8th Cir.), cert. dismissed, 353 U.S. 952 (1957); *United States* v. *Lester*, 21 F.R.D. 30 (S.D.N.Y. 1957). See also *Hunsucker* v. *Phinney*, 497 F. 2d 29, 34-35 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975); *Smith* v. *Katzenbach*, 351 F. 2d 810, 814-815 (D.C. Cir. 1965); 3 C. Wright, *Federal Practice and Procedure* § 673, at 109-110 (1969) (concluding that Rule 41(e) is subject to equitable considerations). As this Court has only recently reiterated, the decision to stay a potentially duplicative action is largely committed to the sound discretion of the district court. *Will* v. *Calvert Fire Insurance Co.*, *supra*, 437 U.S. at 663-664. See also *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183-185 (1952); *Landis* v. *North American Co.*, 299 U.S. 248, 254-255, 258-259 (1936).

There is no merit to petitioners' claim that the district court's refusal to rule upon their Rule 41(e) motion abridged their First Amendment rights. Virtually all of the materials seized in Rhode Island were business

[3]We have been informed that the grand jury investigation in the District of Massachusetts will be concluded within the next two or three months and that much of the delay involved in this proceeding is attributable to petitioners' actions, including petitioner Guarino's contempt of court for refusing to turn over handwriting exemplars to the grand jury. *In re Guarino*, M.B.D. No. 78-156 (D. Mass. Mar. 14, 1979).

records,[4] whereas all of the materials taken from the truck in Massachusetts were films, books and magazines alleged to be obscene.[5] Nonetheless, petitioners have never attempted to vindicate their First Amendment rights by filing a Rule 41(e) motion in the district court in Massachusetts in the 13 months that have elapsed since the seizure of the truck.[6] In light of the availability of this adequate remedy, the court of appeals did not abuse its discretion in refusing to grant an extraordinary writ to

[4]Contrary to petitioners' suggestion (Pet. 13), the government has not unfairly deprived petitioners of their business records. The government is entitled to retain lawfully seized evidence pending completion of criminal proceedings. See *Warden* v. *Hayden*, 387 U.S. 294 (1967); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). Moreover, here the government has not prevented petitioners from all access to the records in question. Petitioners were informed that they could inspect and use these documents subject to supervision by the FBI to protect against alteration and destruction of evidence. In addition, following several discussions among petitioners' counsel and the two United States Attorneys' offices, the government offered copies of needed documents at no cost to petitioners. Petitioners have not attempted to make use of either of these proposals (Pet. App. A-5).

[5]Apparently the only allegedly obscene materials taken from the Rhode Island premises were 45 copies of films and magazines identical to those previously seized in the truck. Petitioners do not contend that the FBI agents emptied their warehouse of all materials arguably within the search warrant. That substantial quantities of the same publications and films were left behind negates any suggestion that the seizure was for censorship rather than evidentiary purposes. See *Heller* v. *New York*, 413 U.S. 483, 492-493 (1973).

[6]Petitioners suggest (Pet. 10, 27) that because the truck only carried goods directly connected to Imperial Distributors, Inc., the other two petitioners could not vindicate their rights in Massachusetts. But petitioners are interrelated co-conspirators distributing the same materials out of the same premises. Moreover, since the few books and films seized in Rhode Island were identical to those seized in Massachusetts, a declaration by the district court in Massachusetts that the materials at issue were not obscene would benefit all three petitioners.

order the district court to decide petitioners' motion.[7] Cf. *Echols* v. *United States*, 577 F. 2d 308 (5th Cir. 1978), cert. denied, No. 78-757 (Feb. 26, 1979).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JAMES ROLAND DIFONZO
Attorney

APRIL 1979

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[7]We note that petitioners may also return to the Rhode Island district court, which has retained jurisdiction over this controversy, and ask for reconsideration of their motion for return of property in light of the intervening delay in Massachusetts.

[8]Contrary to petitioners' contention (Pet. 25), *Echols* v. *United States, supra*, is not in conflict with this case. *Echols* indicated only that Rule 41(e) was available to allow a defendant to protect his First Amendment rights prior to trial. Nothing in the opinion suggests that the Fifth Circuit would issue a writ of mandamus in the particular circumstances presented here. Indeed, the Fifth Circuit has previously indicated that the exercise of the district court's power to order the return of property alleged to have been unlawfully seized is subject to equitable considerations. See *Hunsucker* v. *Phinney, supra*.

DOJ-1979-04

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1247

IMPERIAL DISTRIBUTORS, INC., ET AL
Petitioners,

v.

HONORABLE RAYMOND J. PETTINE,
UNITED STATES DISTRICT COURT
District of Rhode Island

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF
TO BRIEF IN OPPOSITION

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The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1247

IMPERIAL DISTRIBUTORS, INC., ET AL
Petitioners,

v.

HONORABLE RAYMOND J. PETTINE,
UNITED STATES DISTRICT COURT
District of Rhode Island

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF
TO BRIEF IN OPPOSITION

STATEMENT IN REPLY

The Solicitor General has filed in his Brief in Opposition a section captioned "Statement" which cannot go unchallenged by Petitioners. Therefore the Petitioners herein will correct the record so the Court may be fully and accurately apprised of the full circumstances.

First, under footnote number one on page two of the government's brief it appears the Solicitor General has filed a copy of the Boston Search "Order" Affidavit with the Clerk of this Court. This is a surprisingly complete reversal of the governments prior position even though no copy of such affidavit was served upon counsel for Petitioners herein.

These Petitioners have unsuccessfully sought to obtain a copy of the Massachusetts Affidavit (the foundation of all federal action arising thereafter) since March 3, 1978 or three days after the seizure was initiated. The Court in Massachusetts denied Petitioners motion for a copy of that affidavit which order of refusal was in writing dated March 3, 1978. On March 20, 1978 the federal Court in Massachusetts again denied a request for a copy of the affidavit ordering that the affidavit be "impounded" instead until the grand jury proceeding was completed. On Thursday, April 6, 1978 certified copies of the federal Court record in Massachusetts was obtained but again no affidavit was made available. During the entire trial in Providence the issue of the Court suppressed affidavit was before the Court, at no time did the government produce a copy or permit Petitioners or the Rhode Island federal Court to view it for probable cause.

Secondly, these Petitioners will promptly apply to the Clerk of this Court so as to obtain a copy of the affidavit as filed and review the same for the first time.

In the interim, these Petitioners will take the same liberty and deposit with the Clerk of this Court a copy of the "Order" of the federal Court in Massachusetts issued upon the basis of that affidavit. This "Order" was merely to search "in order to determine whether or not there exists therein" obscene

materials of the same tenor as three named magazines. Clearly this was an order to search for probable cause to seize and of materials not viewed by that Court. This was the foundation of the Rhode Island seizure complained of herein.

This Court should review both documents so as to make a considered determination with all the surrounding facts.

ARGUMENT

I.

The government, in their brief (pp. 3-4) states that the district court recognized that a grand jury investigation in another district might soon lead to the institution of criminal charges. It is just as appropriate, Petitioners think, to consider that at the time of that decision the investigation had been unfruitful for a period of ten months. And this Court can take cognizance of the fact that four additional months have lapsed without indictment together with the fact that the investigation will not be concluded for possibly three additional months. No one can guarantee the results of it in any event, or that any indictment may issue.

Therefore Rule 41(e) has been virtually sterilized of any force and effect in these circumstances. If these Petitioners cannot obtain adjudication of their substantial constitutional claims from February 1978 to at least July of 1979, or later, under Rule 41(e) then the Rule as written is in all material aspects just mere words.

Just as important is the fact that Eagle Productions, Ltd. had not conducted any business of any nature in Massachusetts for at least a year before the seizure as well as at the time

of the seizure. Also the seized materials included the business records of a motion picture theater corporation that had its business premises in Rhode Island and conducted no business in any other state. The business records of a realty corporation, having no dealings with expression materials was another company who had its records seized indiscriminately here.

II.

The government states that much of the delay of the grand jury is attributable to Petitioner Guarino's contempt of court for refusing to turn over handwriting exemplars to the grand jury. This is patently untrue and must be corrected for this Court. Such delay was by the government.

1. Neither William E. Seekford nor Leonard Kamaras, counsel for Petitioners before the trial court, are presently involved in the grand jury proceedings in Massachusetts. Attorney John Sheehan co-counsel here in conjunction with Stephen Fortunato are the counsel for Petitioner Guarino and other persons in that proceeding. These counsel and Petitioner Guarino deny any delay attributable to them and recite the following facts.

Initially, the government took no action with respect to the grand jury proceeding for a period of some six months. No notification was given to Guarino from late June, 1978 until late January, 1979. This was true although the first notification of the need for handwriting exemplars was made in May of 1978.

On three separate occasions thereafter from late January, 1979, Petitioner together with other parties and counsel, traveled from Providence to Boston only to be sent home since

no quorum of the grand jury was present. On two other occasions the government notified Guarino and his counsel not to go to Boston as the quorum was not present. It became so bad that Assistant United States Attorney Charles E. Chase informed Mr. Fortunato to call Boston before making another fruitless trip.

In early March, 1979 Petitioner Guarino and two other people objected to the handwriting exemplars for various reasons. As a result, on March 12, 1979 those parties together with four other persons appeared before the Honorable Judge Freedman in the District Court of Massachusetts. Four persons agreed to give the exemplars. Guarino and two others objected.

The Judge wanted to know the reason for the delay. The government alleged that the parties had failed to come to Boston, as requested, to give the exemplars. When shown the several trips and the other cancelled trips the Court granted a delay of his order for 48 hours so that the three objecting parties could apply to the Court of Appeals for the First Circuit. The application was promptly filed but denied on the second day, March 14, 1979. The same day Mr. Fortunato had delivered a letter to Judge Freedman advising that the three objecting parties would give the exemplars as requested.

On March 21, 1979 Mr. Chase notified Guarino's counsel by telephone to again come to Boston on March 27, 1979. Mr. Fortunato on March 22, 1979 by registered mail requested to have all government requests made in writing so as to avoid future claims of delay. No written notice was received by Petitioner, however on March 27, 1979 an arrest warrant for contempt was obtained by the government. Petitioner, upon hearing this, on April 2, 1979 appeared without subpoena and gave the exemplars.

Therefore, if Petitioner Guarino was guilty of any delay for asserting his rights and seeking to prevent the numerous trips to Boston upon verbal requests when no grand jury quorum was present, such delay could only possibly lay between March 12, 1979 and April 2, 1979 long after this Petition was filed. On the other hand the government did virtually nothing during the remaining year and still states it will continue to possibly July of this year. Therefore, it is incorrect to blame this Petitioner with "much of the delay."

2. Next the government criticizes Petitioners for not filing a Rule 41(e) motion in Massachusetts for 13 months simultaneous with the Rhode Island Motion.

Rule 41 provides that aggrieved parties may file their motion in the District of seizure. This provision permits one to present his claim locally and where the seizure occurred and does not require them to travel to other states to vindicate his rights.

In this case there are no pending criminal charges so there is no district of trial in which to file such a motion. Again the government seeks to avoid the clear language of the rule. In addition what benefit is there to the government or judicial economy to fully try a Rule 41(e) motion, not make a decision, then tell the aggrieved party to file a new one in another state and re-try the entire matter a second time. Similarly, once the prompt Rule 41(e) motion was filed but not concluded these Petitioners cannot conduct two distinct simultaneous identical proceedings seeking the same relief in two separate federal districts. Since inception, this proceeding has been fully viable and not concluded to this date. How then does the government suggest the new identical proceedings could be commenced.

3. The government states (pp. 5, footnote 4) that Petitioners were given the right to obtain copies of the records free of charge, which offer was not taken up by Petitioners. This again is not the case as will be set out here.

Attorney William Seekford here, received a letter from Charles W. Chase, Assistant United States Attorney on Wednesday, April 4, 1979 when he returned to his office in Baltimore. It had been delivered on Monday, April 2, 1979 at a time when Mr. Seekford was in Providence and was dated March 29, 1979. This letter states that he had just learned that the Petitioners sought the seized materials return and access to copies thereof and that he had possession of them and was conducting the grand jury proceeding. This letter acknowledges that Mr. Chase was familiar with the claims presented to this Court and he wished for the first time to make the records available at no cost although it is their policy to require payment for photocopying. A copy of their letter was sent to the Solicitor General.

Three days later, on April 7, 1979 the Solicitor General's Brief in Opposition was delivered by mail to counsel's office. In the footnote it is asserted that through conversation with the government and counsel for Petitioners that such records were available without cost but no records were thereafter sought. The offer was given as a stated fact.

Counsel of record interviewed attorneys John Sheehan and Stephen Fortunato involved in the Boston proceeding. No such offer was ever given them until they read Mr. Chase's letter. That is also true of Mr. Seekford, counsel herein.

In addition, on June 8, 1978 Petitioners filed, as exhibits, letters between counsel and both federal and Rhode Island

state government asking for extensions with respect to tax reports and returns, and letters of rejection as to the requests.

Petitioners, meanwhile, met with the I.R.S. and counsel in May of 1978 and reached a compromise for estimated tax returns subject to future correction when the records would be made available.

Attorney Leonard Kamaras, in mid-March 1978 requested to obtain records which were necessary for government reporting and to continue dissemination. Their request was made initially to Robert C. Power, Assistant U.S. Attorney who is directly involved in the Boston matter and who was present during the seizure. Mr. Power suggested writing to the federal authorities citing the government seizure and request extensions. This was done but rejected. Copies of the requests and rejections were filed in the federal Court.

Further, someone of the federal prosecutors had agreed that, approximately 100 pages (2 sides to each page) of certain payroll information from January 1, 1978 through February 28, 1978 would be made available. They had taken such a long time that Petitioners met with the I.R.S. as set out above and in May of 1978 reached a compromise as to averaging out prior figures. When the records came to Providence thereafter a demand of $69.00 was made for photocopying these few pages. Due to the delay no copies were made.

At no time up to well after filing this Petition has the government given Petitioners open access to the records. Only specifically designated documents would be made available and not review of these records by Petitioners was provided. And at no time was it to be granted without payment until the filing of the government brief herein.

CONCLUSION

The facts and statement of the government is misleading to the Court. This reply brief is filed to correct these inaccuracies.

It is noteworthy that the two named F.B.I. officers in the motion below were assigned to the Boston office. It is inconceivable therefore that the federal prosecutor in Boston who appeared and opposed even disclosure of the search Order affidavit did not know Petitioners sought the seized materials when this matter was taken all the way to this Court for resolution. Ironically the offer came after this Petition.

Petitioners respectfully request this Court to require the District Court not to sit upon the rights of Petitioners by directing the Court of Appeals to issue its Writ of Mandamus, to do otherwise is to abandon the tenets of Rule 41(e) and to fail to recognize the fragile position of federal First and Fourteenth Amendment rights under these circumstances.

Petitioners ask this Court to consider the following. First, if the Boston affidavit was sufficient why was it kept suppressed for a year not only from these Petitioners but also the federal trial court. Secondly, what possible harm can the government receive from a judicial determination if the seizure was valid in all respects. Third, why has the government now, after some 14 months and after this Court is considering these claims, decided to allow access to the materials and copying at no cost when such a claim is pending here. Fourth, how could the Assistant United States Attorney in Boston not know of the request for access and copies when that assistant appeared in Court in Boston and openly and successfully

fought against disclosing the affidavit and has as well worked on the investigation with the two investigating F.B.I. agents who were named originally or Defendants and testified below as to the claims and with Assistant U.S. Attorney Powers who participated otherwise and was in court. Finally, is the Federal Rules of Criminal Procedure a mandated control for the government as well as civilian litigants or merely a guide to informed discretion or has been the case here.

Respectfully submitted,

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